Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Deployment	**WT Docket No. 17-84**

COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-6771
E-Mail: william.sanders@sfgov.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statutes and Codes

State Statutes and Codes

San Francisco City Ordinances

Other References

FCC References

I. INTRODUCTION AND EXECUTIVE SUMMARY

The City and County of San Francisco ("San Francisco" or "City") submits these comments in this proceeding in which the Federal Communications Commission ("Commission" or "FCC") is exploring actions the Commission could take to remove regulatory barriers to infrastructure investment at the federal, state, and local level.[1] San Francisco, like many local governments, supports efforts to deploy the infrastructure necessary to make sure that San Francisco's businesses, residents, and visitors have access to the most advanced broadband networks available—whether those networks are wireless or wireline. San Francisco understands that high-speed internet access fuels business growth and makes our neighborhoods and communities better.

Congress enacted the Telecommunications Act of 1996 to allow for new competitive local exchange carriers ("CLECs") to compete with incumbent local exchange carriers ("ILECs") In these comments, San Francisco explains its process for allowing CLECs to enter into the market to provide telecommunications services. Once authorized, a CLEC may install the facilities it needs in the public right-of-way by obtaining simple, expeditious administrative permits. San Francisco also shows that while there once was a robust market for CLECs seeking provide services in San Francisco that is no longer the case.

With respect to the Commission's Notice of Inquiry,[2] San Francisco does not see the need for the Commission to further examine 47 U.S.C. section 253 in order to provide new or updated guidance or determinations as to the scope and meaning of those provisions. The Commission's prior rulings, and dozens of court decisions, have made the purpose, scope, and meaning of that provision clear to the industry and state and local governments. Nor should the Commission look into the question of whether the Commission may regulate cable

[1] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 2017 WL 1426086 (2017) ("*Wireline NPRM/NOI*").

[2] San Francisco is not submitting any comments on the Commission's Notice of Proposed Rulemaking.

franchise fees under section 253. The Commission has no authority to alter the federal requirement that cable operators pay franchise fees based on gross revenues.

II. STATEMENT OF FACTS

Under California law, telephone corporations have a franchise right to use the public right-of-way.[3] Local governments cannot exclude telecommunications carriers from using the public right-of-way,[4] nor can they require telecommunications carriers to pay a fee for the privilege of using the public right-of-way.[5] Any permit or other fees local governments charge telecommunications must be cost-based. [6]

Under San Francisco law the process for a telecommunications carrier to seek and obtain the right to use the City's public right-of-way to provide service is an expeditious one. All a telecommunications carrier needs from San Francisco prior to installing any telecommunications facilities in the public right-of-way is a utility conditions permit ("UCP").[7] For a CLEC, an application for a UCP requires the applicant to demonstrate that the California Public Utilities Commission has granted the applicant a certificate of public convenience and necessity ("CPCN") to provide telecommunications services in San Francisco.[8] This is San Francisco's way of determining that an applicant for a UCP is authorized to provide

[3] Public Utilities Code section 7901 provides that telephone companies, including the wireless companies, "may construct lines of telegraph or telephone lines along and upon any public road or highway. . ., and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines." (Cal. Pub. Util. Code, § 790l.) This statutory language grants a statewide franchise: the right to engage in the telecommunications business in California. *Western Union Tel. Co. v. City of Visalia*, 149 Cal. 744, 750 (1906).

[4] *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 119 (1911).

[5] See *County of Los Angeles v. Southern Cal. Tel. Co.,* 32 Cal. 2d 378, 384 (1948).

[6] *See* Cal. Gov. Code § 50030.

[7] *See* S.F. Admin. Code § 11.9.

[8] San Francisco also issues UCPs to entities that use licensed spectrum to provide wireless services in San Francisco and to those that have a state franchise to provide video services. *See* S.F. Admin. Code § 11.9.

telecommunications services. The applicant must pay a cost-based fee of $2,000 to obtain a UCP, which must be renewed every two years.

San Francisco's UCP contains a number of provisions that protect the public health, safety, and welfare. In particular, it requires carriers to maintain adequate insurance and indemnify the City. It also requires carriers to remove or relocate their facilities in the event they conflict with a City project.

Once a telecommunications carrier has obtained a UCP, it may begin installing telecommunications facilities in the public right-of-way. To install fiber-optic facilities on existing utility poles, the carrier will need a temporary occupancy permit if the installation requires the carrier to occupy space on the streets for an extended period.[9] Otherwise, no permit would be required. To install underground facilities, the carrier will need an excavation permit.[10] Both temporary occupancy and excavation permits are cost-based permits that are not specific to telecommunications carriers. Any entity performing similar work would have to obtain such permits.[11]

Soon after Congress enacted the Telecommunications Act, and authorized new CLECS to enter the market to compete with the ILECs, new CLECs inundated San Francisco and other large cities with requests for authority to install and maintain facilities in the public right-of-way. There were literally dozens of CLECs trying to compete in San Francisco. As discussed above, San Francisco issued UCPs to many of those entities.

As the Commission is aware, CLECs were never able to fully compete with the ILECs. Many of those entities no longer exist or have left the San Francisco market entirely. Today,

[9] *See* S.F. Pub. Works Code § 724.

[10] *See* S.F. Pub. Works Code art. 2.4.

[11] In order to protect its streetscapes, San Francisco has special permits for large telecommunications facilities. San Francisco requires a personal wireless service facility site permit is required to install a wireless facility on an existing utility or other pole. *See* S.F. Pub. Works Code art. 25. A surface-mounted facility site permit is required to install a large equipment cabinet in the public right-of-way. *See* S.F. Pub. Works Code art. 27.

only a handful of wireline CLECs continue to renew their UCPs and obtain excavation and other permits.

III. COMMENTS ON THE NOTICE OF INQUIRY

A. The Notice of Inquiry Cites No Compelling Reasons for the Commission to Adopt Rules Preempting Local Regulation Over the Deployment of Wireline Facilities

The Commission seeks comment in this proceeding on whether it should enact rules under 47 U.S.C. section 253 to "promote broadband deployment by preempting state and local laws that inhibit broadband deployment."[12] There is no compelling reason for the Commission to adopt such regulations.

In the Telecommunications Act of 1996, Congress for the first time opened the door for CLECs to provide local telecommunications services in competition with the ILECs.[13] Congress intended 47 U.S.C. section 253 to prohibit local regulations that would prevent these new CLECs from competing with the ILECs.[14] To accomplish its purpose, in section 253(a) Congress preempted local "statutes or regulations" that "may prohibit or have the effect of prohibiting" the provision of "telecommunications services"[15].[16] In light of the statutory language, it is not

[12] *Wireline NPRM/NOI*, *supra*, 2017 WL 1426086, at * 31, ¶ 100.

[13] See generally *AT & T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 405 (1999) (Thomas, J., concurring in part, dissenting in part); and *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 15 (1st Cir. 2006).

[14] *See Cablevision of Boston, Inc. v. Public Imp. Comm. of City of Boston*, 184 F.3d 88, 97 (1st Cir. 1999).

[15] The Commission asks the following question: "What telecommunications services are effectively prohibited by restrictions on broadband deployment?" *Wireline NPRM/NOI*, *supra*, 2017 WL 1426086, at * 32, ¶ 101. As of today, the answer to that question seems clear. In 2015, the Commission found that broadband internet access is a telecommunications service. *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5615, ¶ 46 (2015). However, the Commission has opened a new proceeding to revisit that determination. See *In the Matter of Restoring Internet Freedom*, 2017 WL 2292181, Notice of Proposed Rulemaking (2017). The Commission could decide that internet service is an information service. *Id*. at *16, ¶ 54. If the Commission were to so find, it would become unclear how restrictions on broadband deployment could not effectively prohibit the provision of any telecommunications service.

[16] 47 U.S.C. § 253.

surprising the reported cases under section 253 largely concern claims that a local government ordinance or other regulation imposed a barrier to a CLEC's efforts to enter the market. [17] [18]

Both this Commission and the federal courts generally agree that the pertinent test under section 253(a) is "'whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" [19] [20] This test establishes a threshold that is not easily met. An effective prohibition should not be based on a showing that local government regulations imposed minor inconveniences or delays in entering the market to provide services, or that a provider that has already entered the market to provide services was denied an application to install a single facility.

There is no compelling evidence that in 2017 local governments are imposing barriers to CLECs entering their markets to provide telecommunications services. In fact, the primary evidence the Commission cites is an article in *Wired* from 2013 that lauds the approach that

---

[17] See, e.g., *Level 3 Commc'ns, L.L.C. v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004); *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002); *City of Auburn v. Qwest Corp*., 260 F.3d 1160 (9th Cir. 2001), overruled by, *Sprint Telephony PCS, L.P. v Cnty. of San Diego,* 543 F.3d 571 (9th Cir. 2008); and *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000).

[18] As competition among CLECs waned, so did the number of cases brought seeking to preempt local ordinances under section 253. A Westlaw search on June 7, 2017 of "253 /s telecommunications and DATE (before 2010)" came up with 242 reported federal cases, while a search of "253 /s telecommunications and DATE (after 2009)" came up with only 46 reported federal cases.

[19] *Puerto Rico Tel. Co.*, *supra*, 450 F.3d at 18; *Qwest Corp*., *supra*, 380 F.3d at 1271; and *TCG New York, supra,* 305 F.3d at 76 [all quoting *California Payphone Ass'n*, 12 F.C.C.R. 14191 (1997)]; see also *Sprint Telephony PCS, L.P. v Cnty. of San Diego,* 543 F.3d 571, 578 (9th Cir. 2008); and *Level 3 Commc'ns, supra*, 477 F.3d at 533 (both relying on that decision).

[20] In *City of Auburn*, the Ninth Circuit held that section 253 preempts local "regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that may ... have the effect of prohibiting the provision of such services." *City of Auburn*, *supra*, 260 F.3d at 1175 (internal quotation marks omitted; alterations in original). While the Ninth Circuit later rejected that test in *Sprint Telephony*, *supra*, 543 F.3d at 577–578, the Commission suggests that the First, Second, and Tenth Circuits still rely on it. See *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 2017 WL 1443827 at *30, ¶ 91 (2017). However, as noted above, the First, Second, and Tenth Circuits all cite the test adopted by the Commission in *California Payphone Ass'n*.

Kansas City took to enable Google Fiber to wire up the city.[21] The conclusion to be drawn from the Google Fiber experience, however, is that even intensive local government efforts to promote broadband deployment are not sufficient. Some four years later Google Fiber seems to be pulling back from its efforts to make its service available to all Kansas City residents.[22]

Prior to taking any steps to preempt local regulation, the Commission should establish that such steps are needed. The evidence does not support such steps at this time. Anecdotal information alone does not provide a balanced and comprehensive record to support pre-emption. Although the NOI notes that "not all state and local regulation poses a barrier to broadband development"[23], the questions invite one-sided responses. For example, the NOI asks for examples where local regulations have caused delays and seeks comment on whether the Commission should act to address "bad faith conduct" in certain negotiations and processes.[24] This type of question invites speculation about the motivations of state and local government officials. Speculation is not evidence. In the context of adopting rules for nationwide broadband deployment, the Commission should develop a thorough record on the context of alleged incidents so that it can determine whether these are isolated incidents or indicate broad problems that the Commission can effectively address. Without a balanced record, the Commission may be taking needless action. Furthermore, isolated incidents may be

[21] See *Wireline NPRM/NOI*, *supra*, 2017 WL 1426086, at *32, ¶ 100, and fn 143, citing Berin Szoka, Matthew Starr, and Jon Henke, "Don't Blame Big Cable. It's Local Governments that Choke Broadband Competition," *Wired* (July 16, 2013), available at https://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/

[22] *See* Jacob Kastrenakes "Google Fiber reportedly cancels hundreds of installations in Kansas City," *The Verge* (March 21, 2017), available at https://www.theverge.com/2017/3/21/15009694/google-fiber-kansas-city-cancellations; *and*

Bobby Burch, "Google Fiber clarifies KC plans after reports of mass cancellations," (March 22, 2017), available at http://www.startlandnews.com/2017/03/google-fiber-clarifies-kc-plans-reports-mass-cancellations/

[23] *Wireline NPRM/NOI*, *supra*, 2017 WL 1426086, at *32, ¶ 101.

[24] *Wireline NPRM/NOI*, *supra*, 2017 WL 1426086, at *34, ¶ 107.

best addressed on a case by case basis rather than through a one-size-fits-all "streamlined" process that may work in some places but create additional delays in others.

B. The Commission Correctly Notes that the Commission Cannot Enact Rules under Section 253 to Address "'Excessive' Cable Franchise Fees"

Section 622 of the Cable Communications Policy Act of 1984 provides that a local franchising authority may require a cable operator to pay a franchise fee that "shall not exceed 5 percent of such cable operator's gross revenues . . . from the operation of the cable system to provide cable services."[25] That section also prohibits federal agencies from regulating "the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section."[26] As the Commission correctly notes, this section "prevent(s) the Commission from enacting rules pursuant to Section 253 to address 'excessive' cable franchise fees."[27] Still, the Commission suggests that those franchise fees "could be taken into account when determining whether other types of fees are excessive."[28]

The Commission has not cited any authority for this extraordinary proposition. Cable franchise fees that federal law authorizes a local franchising authority to impose on cable operators, and that a cable operator agrees to pay,[29] are separate and apart from any fees that a local government is entitled to impose on that cable operator for the operator's provision of telecommunications or other services. This is clear from federal law, which exempts from the definition of the term franchise fee "any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against

---

[25] 47 U.S.C. § 542(b).

[26] 47 U.S.C. § 542(i).

[27] *Wireline NPRM/NOI*, *supra*, 2017 WL 1426086, at *33, ¶ 104.

[28] *Id.*

[29] In many states, local governments enter into cable franchise agreements with the operators. That has not been the case in California since 2006, when the state took over and started issuing state video franchises. Still, California adopted a state franchise fee of five percent of gross revenues that goes to local governments. *See* Cal. Gov. Code § 5840(q)(1).

cable operators or cable subscribers)."[30] Any fees imposed on cable operators by virtue of their providing other services are not franchise fees under this section

The Commission should not construe section 253 to allow a cable operator to seek to reduce its franchise fees as a result of any fees it may be required to pay for the provision of telecommunications or other non-cable related services.

IV. CONCLUSION

San Francisco appreciates the opportunity participate in this proceeding and to address its concerns. There is no good reason for the Commission to take steps to preempt local authority over the deployment of wireline facilities. Over the years, San Francisco has supported the deployment of wireline facilities by competitive local exchange carriers. San Francisco intends to continue to support that deployment.

Dated: June 15, 2017

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
WILLIAM K. SANDERS
Deputy City Attorney

By: /s/
WILLIAM K. SANDERS

Attorneys for
CITY AND COUNTY OF SAN FRANCISCO
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-6771
E-Mail: william.sanders@sfgov.org

[30] 47 U.S.C. § 542(g)(2)(A).